IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-757

CUMMINS ENGINE COMPANY, INC.,
Petitioner,

vs.

ALAN CARNEY,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The petitioner, Cummins Engine Company, Inc., would respectfully note that since the filing on November 13, 1979, of its Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit there has arisen a conflict among the United States Courts of Appeals on the issue raised in the Petition. Specifically, petitioner would point out that on January 24, 1980, the United States Court of Appeals for the Sixth Circuit issued its decision in *Monroe* v. *Standard Oil Company,* No. 78-3233, ... F. 2d, ... (6th Cir. 1980), reproduced in the Supplemental Appendix hereto (S. A. 1-S. A. 11), which decision conflicts with the decision of the Seventh Circuit in this cause and with that of the Fifth Circuit,

on almost identical facts, in *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir., 1980). In fact, the Sixth Circuit specifically noted its conflict with *West, supra.* (S. A. 10).

In *Monroe,* the Sixth Circuit held that the scope of a reservist's rights is defined by an applicable collective bargaining agreement and the employer's practices. The Sixth Circuit held that § 2021(b)(3) did not create new rights or require affirmative action to protect reservists from losing benefits due to their absences so long as they received equal treatment. In short, the Sixth Circuit held that § 2021(b)(3) is not violated so long as a reservist or national guardsman is treated the same as other employees. *Monroe, supra.* (S. A. 9).

The Sixth Circuit's holding in *Monroe* is in direct conflict with the holding of the Seventh Circuit in this cause. The Seventh Circuit found that § 2021(b)(3) creates for reservists the right to be allowed to make up overtime opportunities missed and that it is "immaterial that non-military employees of defendant on leave of absence would not be entitled to overtime opportunities. . . ." *Carney* v. *Cummins,* 602 F. 2d 763 (7th Cir., 1979) (A6). This holding directly conflicts with the holding in *Monroe* wherein § 2021(b)(3) was found to create no new rights for reservists but merely to assure them equal and non-discriminatory treatment. The conflict between *Monroe* and the decision of the Court below is all the more apparent when the decision below is closely examined.

The Court below held that equal treatment under the collective bargaining agreement was insufficient with respect to Carney's right to make up missed overtime opportunities. In other words, even though Carney was treated just like any other employee and accorded equal treatment—the test for determining legality as set forth by the Sixth Circuit in *Monroe, supra*—the Court below held that equal treatment was insufficient and proceeded to imply, under an unarticulated theory of affirmative action (ftnt. 3, A6), a statutory right to make up the missed opportunities irrespective of the collective bargaining agreement.

After reasoning that the right to make up overtime was guaranteed to Carney by statute rather than contract, the Seventh Circuit went on to reason that the contractual provision inserted at the request of the U. S. Department of Labor (P5, Res. Br. 3) could not be given effect. This contractual provision granted to reservists the right to make up overtime opportunities missed while on reserve duty—a right not given to any other class of employees and, therefore, not required by *Monroe.* However, the provision allowed make up of the missed opportunities only so long as the reservist remained in the department where they arose. If, as in this case, the reservist transferred departments before making up those opportunities he lost the right to make up the opportunities and was returned to his position of equality with all other employees. The Seventh Circuit refused to give effect to this provision on the basis that the right to make up the missed opportunities was statutory and therefore not subject to forfeiture when respondent transferred departments. (A4).

After holding that the statutory right to make up missed opportunities was not subject to forfeiture, the Court below then sanctioned less than equal treatment of reservists under the collective bargaining agreement *because of their reserve status.* It held that reservists, unlike all other employees, need not be paid for such nonforfeitable opportunities upon transfer notwithstanding the fact that the collective bargaining agreement requires that *all* opportunities not subject to forfeiture be paid upon transfer. (A7). That is, having first ruled that equal treatment for reservists regarding accumulation of missed overtime opportunities is not sufficient and affirmative action or more favorable treatment is required by statute, the Court below turned around to declare that reservists are employees not entitled to the protection of a contract clause requiring that all employees be paid upon transfer for accumulated non-forfeitable missed overtime opportunities. Such a result is not only in conflict with the *Monroe* Court's mandate of equal treatment but also is incongruous.

While the Sixth Circuit in *Monroe* clearly condemned the rationale of the Seventh Circuit below (S. A. 8-S. A. 9, S. A. 10) it made reference to its ability to reach the same result. (S. A. 10). However, it is clear such reference was made because the Sixth Circuit incorrectly assumed that other employees of Cummins had the right to make up missed overtime opportunities and were paid for such opportunities upon transfer. (S. A. 11). Because it did not have the record in the Seventh Circuit before it, the *Monroe* court overlooked the fact that the contract provision in question, adopted at the request of the Department of Labor, was not discriminatory but was adopted to give reservists an advantage not afforded other employees. The *Monroe* court's statement that it could reach the same *result* as the Court below arises from its failure to recognize that the other employees did not have the right to make up missed opportunities. When this is recognized, the application of *Monroe* to the facts in this case would mandate the reversal of the judgment of the District Court.

The Seventh Circuit held below that the right it found to make up the missed overtime opportunities was statutory rather than contractual precisely because the contractual modification gave reservists the right to make up missed overtime opportunities only as long as the reservist remained in that department. If the reservist transferred departments, any opportunities not previously made up were lost. This loss upon transfer did not discriminate against reservists in a fashion condemned by *Monroe* because no other class of employees had the initial right to make up missed opportunities. Providing a right to reservists not given to any other employees does not constitute discrimination *against* reservists merely because the right is conditioned and the condition in fact occurs. The fact remains that no other class of employees had that right, whether or not the condition occurred, and reservists were thus treated better and not worse than or equal to other employees. It was for this reason the Court below had to find the right to make up missed

overtime opportunities to be statutory rather than contractual—a finding clearly condemned in *Monroe, supra.* (S. A. 8-S. A. 9). The actual conflict between the decision below and that of the Sixth Circuit in *Monroe* v. *Standard Oil Co.* justifies the grant of a writ of certiorari to review the judgment below.

CONCLUSION

For the reasons set forth herein and previously set forth in the Petition For A Writ Of Certiorari: the petitioner requests the issuance of a writ of certiorari to review the judgment and opinion below.

Petitioner would further respectfully request that consideration of the petition in this cause be postponed pending the filing of any Petition for Certiorari by the Solicitor General of the United States in *Monroe* v. *Standard Oil Company* and that the petition herein be considered contemporaneously with any petition filed in *Monroe* v. *Standard Oil Company.*

Respectfully submitted,

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APPENDIX.

No. 78-3233

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ROGER D. MONROE,
Plaintiff-Appellee,
vs.
THE STANDARD OIL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed January 24, 1980.

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal by the defendant-appellant, The Standard Oil Company (Sohio), from a summary judgment of the district court granting plaintiff-appellee recovery of wages for time spent attending military reserve meetings during his regularly scheduled work hours.[1] Recovery was predicated on 38 U. S. C. § 2022 and § 2021 (b)(3) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

1. The district court opinion is reported at 446 F. Supp. 616 (N. D. Ohio 1975).

The case was submitted to the trial judge by counsel for the parties on a stipulation of facts.

During the years 1975 and 1976, the years in which Sohio allegedly violated the Act, plaintiff-appellee, Roger D. Monroe was a full-time employee of Sohio at its Lima, Ohio, refinery. He was also a member of a unit of the Army Reserve and was required to train with his unit on the third weekend of each month and during the last two weeks of August each year.

Throughout the two years in question, Sohio operated its Lima refinery twenty-four hours per day, seven days per week. The work day was divided into three eight-hour shifts. Sohio rotated its employees' shifts. All employees were scheduled to work five eight-hour days in a row per week, but with a different five-day sequence each week. Under this system, weekend work was distributed equally among employees in the course of a year.

Appellant scheduled Monroe to work a full forty hours each week. Sohio periodically slated appellee to work Saturdays and/or Sundays just as it did Monroe's fellow employees. Except for normal time off and the absences for inactive military reserve training in issue here, plaintiff customarily worked his scheduled forty-hour weeks with occasional overtime.

Employment at the Lima refinery was governed by a collective bargaining agreement between appellant and the Ohio Chemical and Atomic Workers International Union during the pertinent period. Article V, ¶ 23 of that agreement provided:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

On four occasions during 1975 and 1976, Monroe was able to change shifts with his fellow employees to accommodate his

reserve training and still work a forty-hour week. On twenty-four other days when he was required to train, however, appellee was unable to arrange for an exchange of shifts with other employees. As a result of his absence from the refinery on these days, appellee lost a total of 192 hours of work for which he was not compensated.

Sohio took no steps to provide Monroe with substituted hours or to make up for appellee's lost working time, other than as provided by Article V, ¶ 23 of the collective bargaining agreement. In this regard, Monroe was treated the same as all other Sohio employees under the agreement.

Monroe brought this action against Sohio pursuant to 38 U. S. C. § 2022, asserting that Sohio had violated §§ 2021(b)(3) and 2024(d) of the Act by refusing to rearrange his work schedule to allow him to work a full forty hours per week during those weeks when his military reserve obligation otherwise precluded him from working a full forty hours.

The cause was submitted on the parties' cross-motions for summary judgment. The district court deemed the issue to be whether plaintiff was denied "an incident or advantage of employment," 38 U. S. C. § 2021(b)(3), "when he was unable to exchange shifts with another employee and therefore was unable to work a full forty hour week as employees without military obligations would." The court determined *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio, 1975), *appeal dismissed*, No. 75-2324 (6th Cir. January 21, 1976), to be dispositive of the issue. Sustaining plaintiff's cross-motion for summary judgment, the district court held that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" and awarded plaintiff $1,086.72 for wages lost on those 'workdates when an accommodation should have been made.' This appeal followed.

Appellant contends that it is under no obligation to schedule plaintiff additional working hours or pay him for hours not

worked. Sohio further claims that any obligation it owed Monroe was satisfied when it scheduled him to work forty hours per week and granted him the right to switch hours with other employees. We agree.

We begin by looking at two sections of the Act, both of which govern reemployment rights of reservists.

Title 38 U. S. C. § 2024(d) provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty for training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty for training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

Originally enacted in 1960 as 50 U. S. C. § 459g(4), section 2024(d) extended, for the first time, the rights set forth therein to reservists "who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training periods. . . . S. Rep. No. 1672, 86th Cong., 2d Sess. 2, *reprinted in* (1960) U. S. Code Cong. & Ad. News 3077, 3078.

Section 2024(d) guarantees terms and conditions of reemployment to reservists returning from inactive duty training. It does not, however, protect reservists from discrimination by their employers between training assignments. In the years following the enactment of § 2024(d), discriminatory employment practices intensified. Congress responded by passing what is now 38 U. S. C. § 2021(b)(3)[2] to remedy this problem. Title 38 U. S. C. § 2021(b)(3) reads in pertinent part:

> Any person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces.

2. Formerly, 50 U. S. C. § 459(c)(3).

The problem to be addressed under this statute and the nature of the remedy it was to provide were stated in a report of the Senate Armed Forces Committee. In Senate Report No. 1477, it said:

> Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions . . . or discharged because of [their training obligations]. [Section 2021(b)(3)] is intended to protect members of the Reserve . . . from such practices. It provides that these reservists will be entitled to the *same treatment afforded heir coworkers* not having such military obligations . . . . [emphasis added] S. Rep. No. 1477, 90th Cong., 2d Sess, *reprinted in* (1968) U. S. Code Cong. & Ad. News 3421, 3421.

Lott v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio 1975), *appeal dismissed* No. 75-2324 (6th Cir. January 21, 1976), relied on by the district court, was one of the first cases to interpret section 2021(b)(3). In *Lott*, the court held that the opportunity to work overtime hours qualifies as an incident or advantage of employment protected by section 2021(b)(3), and ruled that a reservist may not be charged for overtime hours that he is forced to refuse because of his military training obligations.

The union contract that controlled overtime scheduling in *Lott, supra,* provided that an employee could refuse offered overtime, but he would be "charged" as if he had worked the scheduled overtime, even if his nonacceptance was due to reasons beyond his control, such as sickness or personal business. The plaintiff in *Lott* missed overtime opportunities on two occasions because of his required attendance at reserve meetings. He was charged for the overtime refused in accordance with the collective bargaining agreement. The *Lott* court rejected the

employer's argument that since the contract was neutral on its face and was applied neutrally by the defendant, plaintiff was being treated equally with his co-workers as required by section 2021(b)(3). The court reasoned that to permit the application of the contract provision with equal force to all employees, including military reservists, "would permit a collective bargaining agreement to nullify the express protections of section [2021(b)(3)]." 395 F. Supp. at 869-870. Finding that the defendant's nonreservist employees were charged only if they "voluntarily" refused overtime, the district court held that the employer was required to accommodate the plaintiff by making missed overtime opportunities available to him.

Based on its reading of the *Lott, supra,* decision, the district court in the present case had "no trouble in holding that being scheduled for a full forty hour week . . . constitutes an incident or advantage of employment" and finding Sohio liable to the plaintiff "for those work dates when an accommodation should have been made." Explaining its holding, the court stated that section 2021(b)(3) "does not mandate that all employees be treated neutrally or equally. It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations. . . ." We disagree.

We do not dispute the district court's holding that plaintiff had a right to be scheduled to work forty hours a week and that this right is an incident or advantage of employment within the meaning of section 2021(b)(3). We reject, however, the district court's conclusion that section 2021(b)(3) imposes upon an employer the affirmative duty to accommodate employees with military reserve obligations by bestowing upon them rights and privileges not generally accorded to their fellow employees.

As a starting point in our analysis, we note that we are required "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for

the benefit of a veteran as a harmonious interplay of the separate provisions permit." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285 (1948). Title 38 U. S. C. §§ 2024(d) and 2021(b)(3) are complementary and must be read together to understand the breadth of and limits to reemployment rights granted to reservists.

Section 2024(d) creates special rights for reservists. It compels employers to grant leaves of absence to employees who must attend reserve training. In addition, Section 2024(d) entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, "which automatically would have accrued to him if he had remained in the continuous service of his employer." *Aiello* v. *Detroit Free Press, Inc.*, 570 F. 2d 145, 148 (6th Cir. 1978). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. *Id.* at 145. *See also, Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975). Thus, it is clear that section 2024(d) does not require employers to pay absent reservists for hours not worked.

Section 2021(b)(3), on the other hand, does not enumerate the incidents or advantages of employment that it safeguards. The protection afforded by this section is purely derivative. It is intentionally framed in general terms to encompass the potentially limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns. But, just as the property rights protected by the Due Process Clause of the Fourteenth Amendment can only be ascertained by looking outside the Amendment to state law, we read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer's business establishment.

In the case at bar, two incidents or advantages of employment were established: the right to be scheduled for a full forty-hour

workweek and the right to exchange shifts with other employees if mutually agreeable to the employees involved and approved by the shift foreman. The record does not reveal whether the right to be scheduled for a forty-hour workweek was guaranteed by the collective bargaining agreement. The parties stipulated, however, that all employees, including the appellee, were customarily scheduled for that number of hours. We believe this to be sufficient to establish an employment practice as an incident or advantage of employment. The right to exchange shifts was provided for under the terms of union contract then in effect. Unquestionably, this right qualifies for section 2021(b)(3) protection as well.

There was no unconditional right to work forty hours a week at defendant's refinery. The right to work forty hours was contingent upon the employees' presence and ability to perform at their regularly scheduled work periods, or, in the alternative, upon successfully arranging to change scheduled working time with other employees. Thus, unless the appellee was denied the right to be scheduled for forty hours a week or denied the right to exchange shifts "because of any obligation as a member of a reserve component of the Armed Forces," § 2021(b)(3), *supra,* no violation of section 2021(b)(3) occurred.

Section 2021(b)(3) provides that incidents or advantages of employment may not be "denied . . . because of any [military obligation]." This clause is subject to two interpretations in cases such as this. First, it can be read to mean that any time an employee's forced absence for reserve duty requires him to forgo a benefit that would have accrued to him only if he had been present for work, he has been "denied" an incident or advantage of employment "because of" his military obligation. This is the interpretation subscribed to by the court in the instant case and the court in *Lott* v. *Goodyear Aerospace Corp., supra,* 395 F. Supp. 866. Under this view, employers have a duty to alter their employment rules, which may necessitate the fashioning of exclusive preferential rights, to accommodate reservist-

employees' military training obligations. An employer must shoulder this burden even though the detriment to the reservist is a direct consequence of his military undertaking and not the result of intentional unequal treatment by his employer. We believe such an interpretation ignores the legislative history of the Act and requires a tortured reading of section 2021(b)(3).

The legislative history clearly states that section 2021(b)(3) is aimed at combatting discriminatory practices of employers. To this end, section 2021(b)(3) was enacted to ensure that reservists would be "entitled to the same treatment afforded their coworkers not having such military obligations." S. Rep. No. 1477, *supra,* at 3421. We find no support in the legislative history of this section for the view that reservists are to receive preferential treatment; only that they must not be subjected to on-the-job bias by their employers because of their prospective military obligations.

In the absence of a clear and unambiguous statutory mandate to the contrary, we hold that section 2021(b)(3) merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations. To meet this requirement, collective bargaining agreements and employment rules must be facially neutral and must be applied uniformly and equally to all employees.

The requirement of equal treatment was met in the present case. The parties agreed that appellee was regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees.

The condition precedent to plaintiff's right to work forty hours, as opposed to being scheduled to work forty hours, was

never satisfied. The right to work forty hours was contingent on appellee's being present for work or arranging to switch shifts. On twenty-four occasions, appellant was unable to do either. His inability to exchange shifts was not due to unequal treatment by the appellant but attributable to the lack of co-operation on the part of his fellow employees. Nor were Monroe's absences on these occasions the result of disparate employment practices designed to deny appellee the right to be present for work because of his status as a member of the military reserve. Monroe was absent because he had to attend reserve training. Appellant was required to grant appellee a leave of absence on these days, and it did. It was not required to do more. Thus, the right to work forty hours during the weeks in question did not vest. Since there was no right to work forty hours during these weeks, there was no incident or advantage of employement protected by § 2021(b)(3) that was "denied . . . because of any obligation as a member of a reserve component of the Armed Forces." Sec. 2021(b)(3), *supra. West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir., 1980), involved a suit similar to the case at bar. There, the collective bargaining agreement guaranteed employees the right to work forty hours a week conditioned upon their pressence at work. Interpreting § 2021(b)(3) to require that such agreements be construed as if an absent employee is "constructively present" on those days he has reserve training, the Fifth Circuit held that the employer was required to accommodate the plaintiff by rescheduling him during those weeks when he was absent for reserve duty. We find nothing in the legislative history or the statute to support judicial invalidation of nondiscriminatory conditions precedent to employee benefits and adhere to our belief that conditional benefits are protected by § 2021(b)(3) only to the extent that the conditions have been actually satisfied.

We believe the result reached in *Carney* v. *Cummins Engine Co., Inc.*, 602 F. 2d 763 (7th Cir. 1979), is consonate with the result here, though we choose not to adopt fully that court's

rationale. In *Carney*, the Court of Appeals for the Seventh Circuit affirmed a district court judgment that a collective bargaining agreement suspending the right of reservists to be paid for accrued overtime when transferring departments was violative of section 2021(b)(3), where other employees were not denied this benefit upon transfer. We agree with the court that the collective bargaining agreement was no defense in that instance, since the contract provision at issue clearly discriminated against reservists. We decline to adopt the courts further reason for affirmance, however, insofar as the court appears to hold that the right to overtime opportunities is conferred by statute rather than by employment contract or practices.

For the foregoing reasons, we reverse the judgment of the District Court and remand the case with instructions to dismiss the complaint.